

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY D. BONNER,

Defendant-Appellant.

UNPUBLISHED

November 17, 1998

No. 198978

Oakland Circuit Court

LC No. 95-140445 FH

Before: Griffin, P.J., and Gage and R. J. Danhof, JJ.*

PER CURIAM.

Following a jury trial, defendant was convicted of being a sexually delinquent person, MCL 750.10a; MSA 28.200(1). He was initially charged with indecent exposure, MCL 750.335a; MSA 28.567(1), and being a sexually delinquent person. Before trial, defendant pleaded guilty to indecent exposure. He was sentenced to four to twenty years' imprisonment for indecent exposure as a sexually delinquent person. Defendant now appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. Defendant objected to all but one of the prosecutor's comments that he alleges were improper. Where defendant objected to the prosecutor's comments, the test of misconduct by the prosecutor is whether defendant was denied a fair and impartial trial. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995), remanded on other grounds 449 Mich 851 (1995). Where defendant failed to object, appellate review of improper prosecutorial remarks is precluded, unless failure to review the issue would result in a miscarriage of justice or a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Issues of misconduct by a prosecutor are decided case by case. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Kulick, supra* at 260. A prosecutor may not argue facts not entered into evidence. However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members and must refrain from denigrating a defendant with intemperate and prejudicial remarks. *Id.* at 282-283.

Defendant first argues that the prosecutor improperly urged the jury to convict him based on civic duty by stating that they would need to build more libraries to accommodate defendant's exhibitionism and voyeurism. We disagree. The prosecutor needed to establish that defendant's behavior of exhibitionism and voyeurism was repetitive or compulsive in order to prove that he was a sexually delinquent person. MCL 750.10a; MSA 28.200(1). Dr. Ronald Kolito opined that defendant was not a sexually delinquent person, in part, because his actions were not "highly repetitious" compared with many other paraphilias involved in exhibitionism and voyeurism. Kolito later testified that defendant's actions would be repetitious if he performed them ten times a year. Thus, the prosecutor was arguing his theory that defendant's actions could be considered repetitious even if he did not perform them ten times a year. In an attempt to show that defining ten times a year as repetitive was excessive, he argued that there would not be enough libraries in the county to accommodate defendant's actions. The prosecutor was not urging the jury to convict defendant based on civic duty.

Defendant next claims that the prosecutor's comment that he could not commit any other acts of exhibitionism since July 1995 because he was in jail since then "constitutes legally improper conduct." He argues that "references to a defendant's prior incarceration, unless specifically ruled otherwise, are generally inadmissible." However, the prosecutor did not refer to defendant's prior incarceration. The prosecutor argued that defendant's actions were repetitive, and that the only reason he had not committed any acts of exhibitionism and voyeurism since July 14, 1995, was because he was in jail. Although the remark may have been prejudicial, we do not believe that defendant was denied a fair trial.

Defendant also claims that the prosecutor argued facts not in evidence by reciting the names of previous victims. During trial, Dr. Clark testified that defendant was previously arrested nineteen times and that there were several police reports indicating that defendant committed indecent exposure from 1979 forward. Defendant told Clark that there were approximately ten or fifteen other instances of window peeping or voyeurism for which he was never arrested. In addition, the parties stipulated to the admission of four certified copies of defendant's previous convictions for indecent exposure and window peeping. During closing argument, the prosecutor discussed seven instances of exhibitionism and voyeurism allegedly committed by defendant and described the circumstances and names of the victims. Of the seven incidents cited, all except for three were apparently testified to by Dr. Clark. However, the names of the victims had not been elicited at trial. It is not clear whether the other three incidents described by the prosecutor were contained in the certified copies of defendant's prior convictions that were admitted into evidence, or whether the names of the victims were contained in those records. Assuming that they were not, then the prosecutor indeed argued facts not in evidence. However, we do not believe that defendant was denied a fair trial by the prosecutor's comments. The prosecutor was required to prove, among other things, that defendant's conduct was repetitive in order to establish that he was a sexually delinquent person. Even if the prosecutor did not itemize the incidents of previous offenses by defendant or the names of the victims in closing argument, the jury nevertheless

heard evidence, aside from the prosecutor's comments, that defendant committed indecent exposure and window peeping numerous times, some for which he was arrested, and some for which he was never caught. Therefore, the jury had ample other evidence from which to determine that his actions were repetitive.

Finally, defendant argues that the prosecutor improperly argued to the jury that he was unrepentant and undeterable by stating: "[H]e doesn't care about the law, he doesn't care about victims, he doesn't care about how this affects the victims' families, he doesn't care about potential punishment, and he doesn't care about changing." Defendant did not object to this comment and we do not believe that failure to fully review this comment will result in manifest injustice. Accordingly, defendant was not denied a fair trial by prosecutorial misconduct.

Defendant next argues that the trial court abused its discretion in qualifying Dr. Charles Clark as an expert witness and allowing him to testify that defendant was a sexually delinquent person. Defendant objected to the qualification of Charles Clark as an expert witness in the area of evaluating whether a person is sexually delinquent. However, he did not object to Clark's testimony regarding whether he was a sexually delinquent person. In order to preserve an evidentiary issue for appellate review, the opposing party must object at trial and specify the same grounds for objection as it asserts at trial. MRE 103(a)(1). *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

The determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the court relied, would conclude there was no justification for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Moreover, where the defendant has not objected to the admission of evidence, but there was plain error, reversal is not required unless the error affected the substantial rights of the defendant. An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

MRE 702 governs the admissibility of expert testimony and provides:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, in order for the opinion of an expert to be admissible, the witness must be an expert, there must be facts in evidence that require or are subject to examination and analysis by a competent expert, and there must be knowledge in a particular area that belongs more to an expert than an ordinary person. *Ray, supra* at 707. The critical inquiry, however, is whether such testimony will aid the factfinder in making the ultimate decision in the case. *Id.*

The prosecutor moved to qualify Charles Clark as an expert in the field of forensic psychology. Defendant objected to Clark being qualified as an expert to render an opinion on the issue whether a person is sexually delinquent on the basis that he had no specialized training regarding sexual delinquency and had never previously evaluated a sexually delinquent person. The trial court qualified Clark as an expert, stating: “I think [Clark] has some specialized knowledge by which he can aid and assist the trier of fact.” We do not believe that the court abused its discretion.

Dr. Clark was a fully licensed, board certified physiologist with a doctorate in clinical psychology, who previously worked at the Center for Forensic Psychiatry for ten years. Clark performed numerous forensic evaluations, which involved determining legal insanity, mental state and mental ability. Although Clark did not receive any special training or take any courses regarding sexual offenders, “a major aspect of the work at the Forensic Center was evaluating individuals who were charged with sexual offenses.” Clark had been qualified as an expert in the field of forensic psychology approximately 175 or 200 times. Clark had never previously performed an evaluation on a sexually delinquent person. However, he had performed “evaluations of other individuals not charged with offenses who were involved in legal procedures having to do with whether they had been sexually inappropriate, for example, had sexual problems.” Because Clark had a doctorate in clinical psychology and extensive experience in forensic psychology and evaluating the mental state of many sex offenders, he had specialized knowledge that belonged more to an expert than an ordinary person. Clark’s testimony regarding defendant’s state of mind aided the factfinder in determining whether his conduct was repetitive and/or compulsive, a necessary element of being a sexually delinquent person. Consequently, the court properly qualified him as an expert.

Defendant also argues that the trial court abused its discretion in allowing the admission of Clark’s testimony that he believed defendant was a sexually delinquent person. The trial court properly allowed Dr. Clark to testify that defendant’s behavior met the definition of being a sexually delinquent person. Consequently, there was no plain error that affected defendant’s substantial rights. *Grant, supra* at 552-553. Accordingly, the trial court did not abuse its discretion in qualifying Charles Clark as an expert witness and allowing him to testify as to whether defendant met the elements of being a sexually delinquent person.

Defendant next argues that the trial court erroneously refused to read the entire definition of a sexually delinquent person to the jury. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. The instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly present the issues to be tried and sufficiently protected the defendant’s rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), remanded 450 Mich 1212 (1995). When a jury instruction is requested on any theories or defenses and is supported by the evidence, it must be given to the jury by the trial judge. *Id.* A trial court is required to give a requested instruction, except where the theory is not supported by the evidence. *Id.*

MCL 750.10a; MSA 28.200(1) provides:

The term “sexually delinquent person” when used in this act shall mean any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

The trial court instructed the jury as follows:

In determining whether a person is a sexually delinquent person, you should consider whether the prosecution has shown that the defendant has committed repetitive or compulsive acts which indicate a disregard for the consequences or recognized rights of others.

We find that the trial court properly refused to read the entire definition of a sexually delinquent person to the jury. The court read the portion of the definition which was supported by the evidence. There was no evidence presented at trial to indicate that defendant used force in attempting sex relations or that he committed sexual aggression against children under the age of sixteen. Accordingly, the trial court correctly denied defendant’s request to read the entire definition of a sexually delinquent person to the jury, because the portion not read by the court was not supported by the evidence.

Defendant next argues that he was denied a fair trial by the cumulative effect of errors at trial. The cumulative effect of several minor errors may warrant reversal when one error standing alone might not. *People v Miller (After Remand)*, 211 Mich App 30, 44; 535 NW2d 518 (1995). However, when determining whether cumulative error had the effect of denying a defendant a fair and impartial trial, only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra* at 292-293, n 64. Because none of the issues raised by defendant on appeal established reversible error in the trial court, defendant’s conviction should be upheld.

Finally, defendant argues that he is entitled to resentencing because his indeterminate sentence of four to twenty years in prison is invalid. We agree. The statute under which defendant was convicted provides for the following alternative sentences:

Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than \$500.00, or if such person was at the time of the said offense a sexually delinquent person, *may* be punishable by imprisonment in the state prison *for an indeterminate term*, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record. [MCL 750.335a; MSA 28.567(1). Emphasis added.]

In *People v Kelly*, 186 Mich App 524, 531; 465 NW2d 569 (1990), we held that the sexually delinquent sentencing scheme is a “specific scheme which controls over the general indeterminate sentence act.” Further, in vacating a similarly invalid sentence, we remanded with the following directions:

This matter is remanded for resentencing. Under the statute at issue, MCL 750.335a; MSA 28.567(1), defendant can be resentenced [1] to imprisonment in the county jail for not more than one year, [2] to a fine of not more than \$500, [3] or to an indeterminate prison term of from one day to life. [*Id.*]

Defendant’s conviction is affirmed. Defendant’s sentence is reversed and the case remanded for resentencing and the imposition of a sentence consistent with MCL 750.335a; MSA 28.567(1), and *Kelly, supra*. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof